

CITY OF SAN JOSÉ, CALIFORNIA
Department of Planning, Building and Code Enforcement
200 East Santa Clara Street
San José, California 95113

Hearing Date/Agenda Number
P.C. 1-25-06 Item:

File Number
CP05-033/ABC05-003

Application Type
Conditional Use Permit / ABC Exception

Council District 4

Planning Area
Berryessa

Assessor's Parcel Number(s)
092-09-010

STAFF REPORT

PROJECT DESCRIPTION

Completed by: Sanhita Mallick

Location: West side of Morrill Avenue, 550 feet southerly of Landess Avenue

Gross Acreage: 9.02

Net Acreage: 9.02

Net Density: n/a

Existing Zoning: CG General Commercial

Existing Use: Commercial Retail Center (Target), restaurant and retail uses.

Proposed Zoning: No change.

Proposed Use: Sale of alcohol for off-site consumption at an existing retail store

GENERAL PLAN

Completed by: SM

Land Use/Transportation Diagram Designation

Neighborhood/Community Commercial

Project Conformance:

☒ Yes ☐ No

☐ See Analysis and Recommendations

SURROUNDING LAND USES AND ZONING

Completed by: SM

North: Retail/Commercial

City of Milpitas

East: Commercial/Two-family dwellings

CO Office Commercial/R-2 Residential

South: Single-Family Residential

R-1-8 Residential

West: Single-Family Residential

A(PD) Planned Development (Residential)

ENVIRONMENTAL STATUS

Completed by: SM

☐ Environmental Impact Report
☐ Negative Declaration circulated on
☐ Negative Declaration adopted on

☒ Exempt
☐ Environmental Review Incomplete

FILE HISTORY

Completed by: SM

Annexation Title: Piedmont No. 1

Date: June 23, 1960

PLANNING DEPARTMENT RECOMMENDATIONS AND ACTION

☐ Approval
☒ Approval with Conditions
☐ Denial

Date: _____

Approved by: _____
☐ Action
☐ Recommendation

OWNER / APPLICANT

Target Corporation
Derek Stohr
1000 Nicollet Mall, TPN-0910
Minneapolis, MN 55403

Department of Public Works

None received

Other Departments and Agencies

See attached memoranda from Police Department Vice Unit.

GENERAL CORRESPONDENCE

None received

ANALYSIS AND RECOMMENDATIONS

BACKGROUND

The applicant, Target Retail Stores, is requesting a Conditional Use Permit and Liquor License Exception to allow the sale of wine and beer for off-site consumption in conjunction with an existing Target retail store. This item was deferred from the December 7, 2005 Planning Commission hearing after receipt of updated information regarding the number of off-sale uses in the vicinity of the project. This is an updated staff report from the one distributed originally for that hearing.

The deferral also allowed staff to review the proposal for compliance with the recently amended regulations pertaining to the off-sale of alcohol, which were approved by the City Council on December 13, 2005 and become effective on February 1, 2006. Although not yet effective, it is important to understand the extent to which this proposal complies with the new regulations. The new regulations include revisions to the location criteria for the approval of Conditional Use Permits for off-sale establishments and codifies findings for the purpose of making a determination of public convenience or necessity in order to grant a Liquor License Exception. The current criteria used for determining public convenience or necessity is not codified in the Municipal Code.

The site is located in the CG General Commercial Zoning District. Sale of alcohol for off-site consumption is allowed in this zoning district with the issuance of a Conditional Use Permit. This proposal includes the concurrent review of a Liquor License Exception which is required for liquor license applications that may be denied by the Department of Alcoholic Beverage Control (ABC) pursuant to Assembly Bill No. 2897(The Caldera Bill). The bill requires that the ABC deny an application if issuance of that license would tend to create a law enforcement problem, or if the issuance would result in or add to an undue concentration of liquor licenses. Undue concentration is defined as when the premises of the proposed license is located in a census tract that has 20 percent more reported crimes than the average number of reported crimes for the City as a whole or when the premises of the proposed license is in a census tract where the ratio of existing retail on-sale/retail off-sale licenses to population in the census tract exceeds this ratio of retail on-sale/retail licenses in the County. In this case the ABC has determined that this application falls under both of the above-described conditions. As such the Planning Commission must review the Liquor License Exception in conjunction with the Conditional Use Permit request.

Project Description

The off-sale of alcohol is proposed in conjunction with an existing, approximately 108,000-square-foot Target retail store. The store is located in a commercial shopping center on a 9.07 -gross-acre site. The shopping center contains a variety of commercial uses, such as Walgreen's Pharmacy, a grocery store, a variety of restaurants and a liquor store. There are two existing off-sale establishments within the shopping center itself and two (2) within 1000 feet of the existing Target Store. The surrounding uses are commercial to the north, commercial and residential uses to the east across Morrill Avenue, single-family residential uses to the south, and multi-family residential to the west of the subject property

The applicant is not proposing any new construction as part of this permit. Under the proposal, and upon the approval of a subsequent Type 20 permit from the Department of ABC, the store would be allowed to sell beer and wine for consumption off the premises.

ENVIRONMENTAL REVIEW

The Director of Planning has determined that this project is exempt from environmental review under the Section 15301 provisions of the California Environmental Quality Act. The Environmental Quality Act, Section 15301 (Existing Facilities - Class 1), specifies that projects may be found exempt which consist of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. Staff has concluded that the project involves the use and minor alteration of an existing facility involving negligible or no expansion of use beyond that for which the facility was constructed.

GENERAL PLAN CONFORMANCE

The existing retail store use and proposed alcohol sales are consistent with the San José 2020 General Plan Land Use/Transportation Diagram designation of Neighborhood/Community Commercial. Retail sales of merchandise are allowed under this designation.

ANALYSIS

The primary issue with this project is the extent to which the sale of alcohol in conjunction with an existing Target will adversely impact the surrounding area, and conform to the Zoning Ordinance and the Liquor License Exception requirements.

Conditional Use Permit

The project proposes the sale of pre-packaged alcohol for off-site consumption. The Zoning Ordinance requires a Conditional Use Permit for off-sale alcohol in the CG General Commercial Zoning District. The current Zoning Code regulations state that the Planning Commission may grant the Conditional Use Permit if it makes the following findings, where applicable:

1. If the use is closer than 500 feet from any other off-sale use, the Planning Commission must find that the proposed off-sale of alcohol would not contribute to an excess concentration of

establishments that sell alcohol.

2. If the use is closer than 500 feet from any child care center, elementary school, secondary school, college or university, or one hundred and fifty feet from any residentially-zoned property, the Planning Commission must find that the building in which the proposed use is to be located is situated and oriented in such a manner that would not adversely affect such residential and/or school use.

The proposed off-sale use is within 500-feet of two other off-sale establishments which are located within the same shopping center. There is a liquor store (Ernie's Liquors), and a supermarket (California Ranch Supermarket), both of which are permitted to sell beer, wine, and spirits for off-site consumption. Target is a large retail store similar in operation to that of a full-service grocery store. The subject store operates from 8 a.m. to 10 p.m. Monday through Saturday and 8 a.m. to 9 p.m. on Sunday. In previous approvals of Liquor License Exceptions, the City has made a determination that this type of business is generally appropriate for off-sale of alcohol. Big box retail stores, including full-service grocery stores and large food/general merchandise stores, operate in a manner that does not facilitate a quick purchase of alcohol for immediate consumption that can be more closely related to alcohol-related incidents. Compared to small convenience stores or liquor stores that offer individually-packaged beverage containers that are ready for immediate consumption, the sale of alcohol at large retail stores such as Target is clearly incidental to the entire operation of the store and constitutes only a small percentage of their overall sales. Planning staff is recommending a condition that the alcohol sales be limited to a maximum of five percent (5%) of the floor area of the store to insure that the off-sale of alcohol remain an incidental use.

The use is also closer than 500-feet to residentially-zoned property that is directly adjacent to the shopping center site to the south and west and on the opposite side of Morrill Avenue to the east. Staff believes, the proposal will not adversely affect the neighboring residential uses, as Target's front entry is oriented away from the residentially-zoned property, and oriented inwards toward the parking lot in keeping with the other commercial uses located in the shopping plaza. Solid perimeter fencing and landscaping separates the store from the residential area. No schools or childcare centers are located within 150 feet of the store. The closest school, Laneview Elementary School, is located approximately 1200 feet northeasterly of the Target store.

From the above analysis, staff concludes that the location of the Target store along with the limitations placed on the sale of alcohol for off-site consumption would not contribute to an excess concentration of establishments or adversely affect nearby residential uses.

Under the revised regulations which will take effect on February 1, 2006, in order to approve a Conditional Use Permit for the off-sale of alcohol findings must be made that the project will not result in more than four (4) off-sale alcohol establishments within a one thousand (1,000) foot radius from the proposed location. As the attached map indicates, with the addition of the proposed establishment, there will be four (4) establishments within 1000-feet. In the event that the new off-sale location would result in more than four (4), the new ordinance includes additional findings that would need to be made. However, since the proposal would not result in more than four establishments they would not be applicable to this proposal.

Liquor License Exception

The applicant has also applied for a Liquor License Exception to request the City make a determination of “public convenience or necessity”. Per the current City policy, the Planning Commission may make a determination of “public convenience or necessity” and grant the Liquor License Exception if the project meets the following criteria:

1. The premises are not located in an existing Project Crackdown /Weed and Seed Area or similar areas that qualify for these programs pursuant to the City’s Neighborhood Revitalization Strategy.
2. The premises are not located within 300 feet of any public or private school.
3. The City’s Police Department has determined that the use would not pose a detriment to the immediate neighborhood or continue current law enforcement problems.

The project site is not located within a Project Crackdown/Weed and Seed Area. Target is required to obtain a Liquor License Exception because the reported crime statistics are over the 20% crime index as defined by ABC. In addition, the premises are not located in any of the listed program areas, and are not located within 300 feet of a school. Based on revised information from the ABC, indicating that the ratio of off-sale retail licenses to population in this Census Tract (5044.10) does exceed the ratio of off-sale retail licenses to the general countywide population, the area is considered to have the potential for an undue concentration of liquor licenses. Whereas the Police Department was previously neutral on this proposal, as a result of the updated information from ABC, the department indicates it is in opposition to the issuance of an off-sale ABC license at this location based on the number of existing off-sale alcohol establishments in the Census Tract. Although the Census Tract itself is potentially over-concentrated according to the ABC criteria, only two of the existing off-sale establishments are located in close proximity to the proposed Target store, (with the other two being located on Capitol Avenue, approximately 4000 feet from the subject site.) Because two of the off-sale establishments are a great distance away from the subject site (over 13 football fields away) and because one of the closer off-sale sites is a supermarket, Planning staff still believes that the approval of this proposal will not result in an excess concentration at this location, and therefore recommend that the Planning Commission grant the Liquor License Exception.

Changes Under the New Ordinance

Under the newly adopted ordinance, only three of the four mandatory findings of public convenience and necessity could be made by the Commission for this proposal as a result of the Target store being located closer than 150 feet of a residence. This ordinance specifies that in cases in which not all of the mandatory findings can be made, only the City Council, on appeal, is able to make a determination of public convenience and necessity only upon making at least one of a set of four findings. These findings include that the proposed off-sale of alcoholic beverages is incidental and appurtenant to a larger retail use and provides for a more complete and convenient shopping experience. Given that the proposed off-sale of alcohol is being requested in connection with the operation of an existing Target retail store that is over 100,000 square feet in size and that Staff is recommending that a condition be included in the permit to

cap the floor area allowed for off-sale of alcohol at a maximum of 5% to further ensure the incidental nature of the proposed off-sale of alcohol activity, staff believes this finding is applicable to the current proposal to allow the sale of alcohol in conjunction with the existing Target store, a large retail user.

CONCLUSION

Planning staff supports the issuance of the proposed Conditional Use Permit and Liquor License Exception. The proposed project meets most of the criteria outlined in the applicable policies and, if applicable, would meet most of the newly created zoning regulations that make allowances for the sale of alcohol in conjunction with a larger retail use. Staff believes that this supermarket-scale business is appropriate for the off-sale of alcohol, would provide a more complete shopping experience, and that such sale is not expected to prove detrimental to the neighborhood. Staff believes the proposed project would provide a convenient outlet for groceries, and other merchandise, along with the incidental sale of alcohol, for the surrounding community. The permit has been conditioned to limit the area of the store that can be used for alcohol display and sales. The building in which the use is proposed and its entrance, is oriented in such a way that it will not likely affect the nearby land uses. Under the existing code regulations, the Planning Commission may approve the subject Conditional Use Permit and Liquor License Exception.

PUBLIC OUTREACH

A notice of the public hearing was distributed to the owners and tenants of all properties located within 500 feet of the project site. Staff has been available to discuss the proposal with members of the public. Additionally, prior to the public hearing, an electronic version of the staff report has been made available online, accessible from the Planning Commission agenda, on the Planning Divisions' website. Planning staff has received two email correspondences (attached) from local residents in opposition to the proposal.

RECOMMENDATION

The Planning staff recommends that the Planning Commission approve the requested Conditional Use Permit and Liquor License Exception and include the following findings and conditions in its Resolution.

The Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. The existing Target store is located on the west side of Morrill Avenue, 550 feet southerly of Landess Avenue (2155 Morrill Avenue).
2. This site has a designation of Neighborhood/Community Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
3. The site is located in the CG General Commercial Zoning District, which allows retail sales as a permitted use and off-site alcohol sales subject to approval of a Conditional Use Permit.
4. The applicant proposes to offer beer and wine for sale for off-site consumption as an incident to the sale of other retail goods.

5. Under the provisions of Section 15301 of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA), this project is exempt from the environmental review requirements of Title 21 of the San José Municipal Code, implementing the California Environmental Quality Act of 1970, as amended. The project will not have a significant adverse effect on the environment.
6. The project consists of the off-sale of alcoholic beverages in an existing, approximately 108,000-square-foot retail building.
7. The proposed project is located within 500 feet of another establishment that sells alcoholic beverages for off-site consumption.
8. The proposed project is located within 500 feet of a residential land use.
9. The project site is located in an area with an existing crime statistics of 20% or greater and thus requires the issuance of a Liquor License Exception.
10. The census tract in which the proposed use is located has a ratio of existing retail on-sale/retail off-sale licenses to population that exceeds the ratio of the County and thus requires the issuance of a Liquor License Exception.
11. The site is not located in an existing Project Crackdown /Weed and Seed Area or in similar areas, which qualify for these programs based on the City's Neighborhood Revitalization Strategy Criteria.
12. The store's front entry is oriented towards Morrill Avenue, away from the adjacent residential uses, in keeping with the other commercial uses located in the shopping plaza.

This Planning Commission concludes and finds, based upon an analysis of the above facts that:

1. The proposed project is consistent with the adopted San José 2020 General Plan Land Use/Transportation Diagram of the City of San José.
2. The proposed location of the off-sale of alcohol use will not contribute to an excess concentration of establishments, which sell alcoholic beverages.
3. The proposed use is located and oriented in such a manner that the off-sale of alcohol use will not adversely affect proximate residential uses.
4. The proposed project complies with all applicable provisions of the Zoning Ordinance.
5. The proposed project satisfies the Zoning Ordinance criteria for approval for the off-site sale of alcohol.
6. The proposal meets the requirements of the Liquor License Exception process.
7. The proposed project is in compliance with the California Environmental Quality Act.

Finally, based upon the above-stated findings and subject to the conditions set forth below, the Planning Commission finds that:

1. The proposed use at the location requested will not:
 - a. Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or
 - b. Impair the utility or value of property of other persons located in the vicinity of the site; or
 - c. Be detrimental to public health, safety or general welfare; and
2. The proposed site is adequate in size and shape to accommodate the walls, fences, parking and loading facilities, landscaping and other development features prescribed in this title, or as is otherwise required in order to integrate said use with the uses in the surrounding areas; and
3. The proposed site is adequately served:
 - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quality of traffic such use would generate; and
 - b. By other public or private service facilities as are required.

In accordance with the findings set forth above, a Conditional Use Permit to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth are hereby granted. This Planning Commission expressly declares that it would not have granted this permit except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

CONDITIONS PRECEDENT

This Conditional Use Permit shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until all things required by the below-enumerated precedent conditions shall have been performed or caused to be performed and this Resolution has been recorded with the County Recorder.

1. **Payment of Recording Fees.** Fees for recording a Certificate of Permit with the Recorder for the County of Santa Clara should be submitted to the Director of Planning within 30 days of approval of this permit, but must be submitted prior to issuance of a Building Permit. Submittal of the recording fee less than one week prior to issuance of a Building Permit will delay the Building Permit issuance for up to one week to allow for recordation of the permit with the County Recorder. This Permit shall be effective at such time when recordation with the County of Santa Clara occurs.
2. **Acceptance of Permit.** Per Section 20.100.290(B), should the applicant fail to file a timely and valid appeal of this Permit within the applicable appeal period, such inaction by the

applicant shall be deemed to constitute all of the following on behalf of the applicant:

- a. Acceptance of the Permit by the applicant; and
- b. Agreement by the applicant to be bound by, to comply with, and to do all things required of or by the applicant pursuant to all of the terms, provisions, and conditions

CONCURRENT CONDITIONS

The subject property shall be maintained and utilized in compliance with the below-enumerated conditions throughout the life of the permit:

1. **Off-sale of Alcohol.** This permit allows the sale of alcoholic beverages for off-site consumption only. The sale of alcohol shall conform to the requirements of the Liquor License requirements of the Department of Alcoholic Beverage Control. The applicant shall obtain all necessary permit(s) and will maintain full compliance and shall remain in good standing with regard to the Department of Alcoholic Beverage Control requirements.
2. **Area for alcohol sales.** Alcoholic beverages sales and display area shall be limited to no more than five (5) percent of the sales floor area of the store.
3. **Nuisance.** This use shall be operated in a manner that does not create a public or private nuisance. Any such nuisance must be abated immediately upon notice by the City.
4. **Retail Store Use.** The sale of alcohol shall be allowed in conjunction with the retail store use only.
5. **No new construction.** No new construction is allowed under this permit.
6. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings and wall surfaces within 48 hours of defacement.

CONDITIONS SUBSEQUENT

1. **Permit Expiration.** This Conditional Use Permit shall automatically expire two years from and after the date of adoption of the Resolution by the Planning Commission, or by the City Council on appeal, granting this Permit, if within such two-year period, the proposed use of this site or the construction of buildings has not commenced, pursuant to and in accordance with the provisions of this Conditional Use Permit. The date of adoption is the date the Resolution granting this Conditional Use Permit is approved by the Planning Commission. However, the Director of Planning may approve a Permit Adjustment to extend the validity of this Permit for a period of up to two years. The Permit Adjustment must be approved prior to the expiration of this Permit.
2. **Revocation, Suspension, Modification.** This Conditional Use Permit may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the

same at such time, whenever, after a noticed hearing in accordance with Part 3, Chapter 20.44, Title 20 of the San José Municipal Code it finds:

- a. A violation of any conditions of the Conditional Use Permit was not abated, corrected or rectified within the time specified on the notice of violation; or
- b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
- c. The use as presently conducted creates a nuisance.

cc: Beth Aboulafia, Esq; Hinman & Carmichael, 260 California St. Ste. 1001, San Francisco CA 94111
Building Division (2)
Engineering Services